TENAGA NASIONAL BHD v. KARUN KLASIK SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
MARY LIM J
[CIVIL SUIT NO: 22NCC-730-05-2012]
15 OCTOBER 2015

PUBLIC UTILITIES: *Electricity – Consumption and usage – Under-recording of actual consumption – Allegation of meter tampering – Whether proved – Whether claim was for loss of revenue under s. 38(3) of Electricity Supply Act 1990 ('ESA') or a claim for back charges – Whether prior conviction under s. 37 of ESA pre-condition for claim of loss of revenue – Whether offence under s. 37(1), 37(3) or 37(14) of ESA must be proved before loss of revenue under s. 38(3) of ESA could be claimed – Whether claim sustainable*

PUBLIC UTILITIES: *Electricity – Disconnection of electricity supply – Entry into premise – Whether entry into premise was at reasonable time and for purpose of routine inspection – Whether purpose of entry was to find commission of offence or to gather evidence – Whether entry should be pursuant to s. 5 of ESA – Whether entries lawful – Whether evidence gathered from illegal inspections could still be relied on as evidence in civil proceedings – Whether counterclaim sustainable*

The plaintiff supplied electricity to the defendant's factory which processes and freezes shrimps ('premise'). The plaintiff carried out two inspections on the defendants premise on 26 January 2011('first inspection') and 16 March 2011('second inspection') respectively. The plaintiff alleged that during both inspections, the plaintiff found that the meter at the premise had been tampered with, and as a result, the defendant was under-billed. Despite several notices, the defendants refused to settle the total outstanding back charges. Subsequently, on 21 April 2011, the plaintiff disconnected the electricity supply to the defendant's premise and claimed the total for loss of revenue under sub-s. 38(3) of the Electricity Supply Act 1990 ('ESA'). The defendant, on the other hand, had a different version of facts. Insofar as the first inspection was concerned, the defendant contended that the search and seizure was unlawful for reasons that (i) no notices were served prior to the first inspection; (ii) the plaintiff trespassed the defendant's premise by breaking the defendant's gate; (iii) the plaintiff entered the defendant's premises at an unreasonable hour; and (iv) no documents were shown by the plaintiff's officers at the material time. In relation to the second inspection, the defendant claimed that the meter had broken down and denied tempering it. As such, the defendant counterclaimed for losses suffered due to damages and as a result of the disconnection. In defence to the counterclaim, the plaintiff contended that the first inspection was part of an operation called 'Ops Mancing' and it was reasonable to carry out the first inspection after office hours. Thus, in reliance to reg. 7 of the Licensee Supply Regulations 1990 ('LSR') and cl. 24 of the Conditions of Supply for Business/Non-Domestic Consumers ('contract'), the plaintiff argued that its inspections

were valid and in accordance with law. The plaintiff also relied on s. 71 of the Contracts Act 1950 and argued that there had been unjust enrichment on the part of the defendant. However, the defendant argued that reg. 7 of the LSR did not apply and that the plaintiff was supposed to act under s. 5 of the ESA. Since the plaintiff did not act under s. 5 of the ESA nor did the plaintiff comply with its requirements, the two inspections were unlawful. The issues that arose for determination were: (i) whether the plaintiff's claim was sustainable given that it did not plead that its cause of action was founded on sub-ss. 38(3), (4) and (5) of the ESA; (ii) whether ss. 5(2) to (6) of the ESA or reg. 7 of the LSR was applicable in regards to the first inspection; (iii) whether the defendant could claim from the plaintiff for damages due to the disconnection of electricity supply; and (iv) whether the evidence gathered from the illegal inspections or searches could still be used or relied on as evidence to prove the plaintiff's claim in the present civil proceeding.

Held (dismissing plaintiff's claim and defendant's counterclaim):

(1) The plaintiff's claim was not a claim for loss of revenue but a claim for back charges for the use of electricity which it did not charge the defendant. Because the plaintiff had chosen to make its whole case on sub-s. 38(3) of the ESA and rely on sub-s. 38(4) and (5) of the ESA to prove its claim, there must be a proper and specific plea with evidence led to show whether the charges for the use of electricity was revenue to the plaintiff. Any claim for loss of revenue was for loss of revenue due to the commission of any of the specified offences under sub-ss. 37(1), 37(3) or 37(14) of the ESA and not for all the offences listed in s. 37 of the ESA. The plaintiff's right to recovery by way of a civil action was ancillary or consequential to the existence of any of the specified offences. (para 31)

(2) A civil action for recovery of loss of revenue may be pursued regardless of whether there had been a charge or a conviction for the offences mentioned in s. 37 of the ESA. There was no charge, let alone a conviction. This did not affect the validity of the plaintiff's claim. However, because of the lack of specific plea with no reference to any of the circumstances under s. 37 of the ESA or even a plea that the plaintiff had suffered a loss of revenue, the present claim could not be treated as one within the meaning, purpose and intent of the ESA. The argument of unjust enrichment also could not be taken up since it was not pleaded. The only basis for the claim would be one in contract since the underlying relationship between the parties was one of contract. Hence, the plaintiff's claim must stand dismissed. (paras 35, 36 & 39)

(3) Clause 24 of the contract was a term of the contract made between the parties authorising the plaintiff to enter the defendant's premise. Under cl. 24 of the contract and reg. 7 of the LSR, such entry is only

'at any reasonable times' and it must be for the object or purpose of a routine inspection and no other. The first inspection was nowhere near the meaning of a routine inspection and was actually part of 'Ops Mancing'. None of the specified objects or purpose of inspection come close to the true purpose of the entry into the defendant's premise, which was to either find the commission of an offence or to gather evidence of the commission of an offence. The hours of entry of the first inspection were also not reasonable hours. With the express presence of s. 5 of the ESA, which was specifically enacted for such purpose, reg. 7 of the LSR could not be a ruse for such entries. (paras 60, 64, 68, 70 & 71)

(4) Subsection 5(1) of the ESA refers to the right of entry of an 'authorised officer'. Since the plaintiff was only a licensee, it did not fall within the definition of 'authorised officer'. However, this did not mean that s. 5 of the ESA did not apply and that the plaintiff may resort to reg. 7 of the LSR. It was for the plaintiff to bring itself within the folds of s. 5. Where the legislation intended such entries to be by way of s. 5 the plaintiff could not avoid such procedure laid down under the ESA. (paras 72, 73 & 74)

(5) Neither reg. 7 of the LSR nor cl. 24 of the contract permitted the plaintiff to enter the defendant's premises for the purpose of evidence gathering. That was quite clear from the terms of both the regulation as well as the contractual arrangement between the parties. The first inspection was quite aside from the real purpose of entry into the defendant's premises and outside the terms of reg. 7. As such, a warrant under sub-s. 5(2) was required. The plaintiff's team also failed to identify themselves at the material time by producing their letters of authorisation. Therefore, the first inspection or entry was unlawful. (paras 76, 77 & 81)

(6) As for the second inspection, it was on the occasion of the defendant's own complaint of a faulty meter. The defendant's Senior Sales Coordinator ('DW2') confirmed the inspection by the plaintiff. DW2 was also present when the plaintiff went to the defendant's premises on 21 April 2011 to disconnect the electricity supply to the defendant's premises. Therefore, the plaintiff's second inspection or entry into the defendant's premises was legitimate, valid and in accordance with reg. 7 of the LSR. (paras 81, 83, 84, 86 & 86)

(7) The present proceedings were civil and not criminal proceedings. Evidence which was not properly gathered or were gathered in an unlawful entry to the defendant's premises did not render the evidence inadmissible in civil proceedings. In the circumstances, any evidence gathered from the first inspection was still admissible. (paras 89, 90 & 91)

(8) The right to disconnect was part of the preventive and pre-emptive measures that the legislation had given to the plaintiff. There were two inspections of what the plaintiff deduced as evidence of tampering. It had issued the necessary notices and had asked for payment, which the defendant had not responded. The plaintiff's decision to disconnect the supply of electricity was not made arbitrarily or without basis. The plaintiff was justified in exercising the right to disconnect the supply of electricity to the defendant's premises under sub-s. 38(1) of the ESA. Therefore, the disconnection was not erroneous and the defendant was not entitled to its claim. The second inspection was a routine inspection and the plaintiff 'stumbled upon' and found what it perceived to be evidence of tampering. The defendant was also not entitled to its counterclaim as the second entry or inspection was lawful. (paras 125, 126, 127 & 128)

(9) Regulation 6A of the LSR allowed for the plaintiff to give not less than 24 hours' notice before disconnecting any supply from any premises pursuant to sub-s. 38(1) of the ESA. The plaintiff had duly complied with the requirements of sub-s. 38(1) and reg. 6A. Accordingly, the disconnection was proper and lawful. (para 131)

Case(s) referred to:

Bell Cablemania Plc v. Simmons [2002] FSR 34 ***(refd)***
Chong Chieng Jen v. Mohd Irwan Hafiz Md Radzi & Anor [2010] 1 CLJ 355 HC ***(refd)***
Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd [2006] 4 CLJ 892 CA ***(refd)***
Competition Authority v. Irish Dental Association [2005] 3 IR 208 ***(dist)***
Ichi-Ban Plastic (M) Sdn Bhd v. Tenaga Nasional Bhd [2015] 10 CLJ 14 CA ***(refd)***
Lim Lean Heng v. Wako Merchant Bank (Singapore) Ltd & Other Appeals [2004] 3 CLJ 9 CA ***(refd)***
PP v. Then Mee Kon; PP v. Chan Kam Lai [1983] 1 LNS 31 HC ***(dist)***
Stephen David Johns v. Robert T Hamilton (Procurator Fiscal, Dumberferline) 1988 SCCR 282 ***(dist)***
Sumbang Projeks Sdn Bhd v. Tenaga Nasional Bhd [2014] 4 CLJ 323 CA ***(refd)***
Tenaga Nasional Bhd v. Api-Api Aquaculture Sdn Bhd [2015] 1 LNS 65 HC ***(dist)***
Tenaga Nasional Bhd v. AWP Enterprise (M) Sdn Bhd [2015] 1 CLJ 400 CA ***(dist)***
Tenaga Nasional Bhd v. Wong Kwi Fong (No. W-02-2901-2010) (Unreported) ***(refd)***
WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478 FC ***(refd)***
Yu-Ai Food Industries v. Tenaga Nasional Bhd (Civil Suit No: 22NCVC-783-2011) (Unreported) ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 71
Electricity Supply Act 1990, ss. 2, 5(1), (2), (3), (4), (5), (6), 6, 37(1), (3), (14), 38(1), (3), (4), (5), 42
Evidence Act 1950, s. 114(g)
Licensee Supply Regulations 1990, regs. 4, 6A(1), 7, 11(2)

For the plaintiff - Syed Fadzil Alhabshi (Nur Zaliqa Zamzah with him); M/s Sidek Teoh Wong & Dennis
For the defendant - Jack Yow Pit Pin; M/s Rahmat Lim & Partners

Reported by Sandra Gabriel

JUDGMENT

Mary Lim J:

[1] The plaintiff's claim is for the sum of RM1,632,564.29 as back billing charges. The claim is denied with the defendant counterclaiming for the sum of RM5,382,139.56 and USD85,000 for losses allegedly suffered as a result of the plaintiff's disconnection of electricity supply to the defendant's premises.

Factual Background

[2] The plaintiff is a company which supplies electricity power in Malaysia and is a licensee under the Electricity Supply Act 1990. Pursuant to a written contract between the plaintiff and the defendant, the plaintiff supplied electricity to the defendant's premise at PT3838 Kolam Udang, Mukim Api-Api, Kg Assam Jawa, 45700 Kuala Selangor, Selangor Darul Ehsan (the said premise). The defendant runs a factory which processes and freezes shrimps which it sells both locally and abroad at the said premise.

[3] On 26 January 2011, the plaintiff carried out an inspection of the meter installation at the said premise in the presence of the defendant's representative/employee (the first inspection). At the inspection, the plaintiff's representative made several discoveries that it recorded down. First, it found that the power readings on the display of the main meter and the check meter differed from the actual readings of power consumption for all three phases of the said meter. Second, it discovered that there was a copper clamp fixed at the bottom side of the Test Terminal Block ("TTB"). Third, that the said copper clamp was used in order to reduce the reading of the power usage into the meter. Fourth, a piece of plastic and tissues were used to avoid contact of the said copper clamp with the meter panel (to avoid scratch marks on the TNB meter installation).

[4] On 16 March 2011, the plaintiff carried out another inspection (second inspection). At this second inspection, the plaintiff discovered that there was mark left on the TNB sticker which suggested that it has been tampered with; that the power reading on the red phase of the main meter is 0 amp whilst for the yellow and blue phases the readings are in reverse; that the current readings for all three phases of the check meter is 0 amp, the voltage reading for the yellow phase is 0 volt; and the neon fuse of the yellow phase had blown.

[5] The plaintiff made separate police reports on 28 January 2012 and 11 May 2005 in which it claimed that there was tampering with the meter on both occasions. The plaintiff claimed that both inspections found that the meter at the said premise had failed to record accurate readings of electricity usage as a result of the said tampering. The readings did not correspond to the actual electricity power supplied and consumed at the defendant's said premise at the material time. In the first inspection, the percentage of error

A was -90.657% (main meter) and -90.663% (check meter). In the second inspection, the percentage of error was -100% (main meter) and -100% (check meter). These findings were duly recorded by the plaintiff. After each inspection and discovery, the meters were reset.

B **[6]** According to the plaintiff, this meant that the monthly billings that were sent differed from the billings which ought to have been issued by the plaintiff. In other words, the defendant has been under billed as compared to the actual amount of electricity supplied. For the first inspection, a sum of RM1,579,981.35 had not been billed for the period from 3 May 2007 to 26 January 2011; whilst in the case of the second inspection, a sum of C RM52,582.94 had not been billed for the period from 26 January 2011 to 16 March 2011.

[7] Despite several notices, the plaintiff claimed that the defendant refused to settle the total outstanding back charge sum of RM1,632,564.29.

D **[8]** The defendant had a different version of the facts. Insofar as the first inspection is concerned, the defendant that at around 4.30am of 26 January 2011, whilst its factory and office was closed, without any prior notice or consent of the defendant and without any authority cards shown to the defendant at the material time, the plaintiff's employees trespassed the E defendant's premises, broke the defendant's gate, broke the lock to the meter room, prohibited the defendant's workers anywhere near the meter room, and forced a visitor to sign its documents. The defendant claimed that the plaintiff's employees did not repair the gate when they left the defendant's premises leaving it unsafe and unsecured. The defendant made a police report of the incident.

F **[9]** The defendant claimed that as a result of the trespass, damage and wrongful acts of the plaintiff, it has suffered loss and damage. In particular, the defendant claimed that it had suffered damage to its reputation from the plaintiff's allegation that it had tampered with the meter.

G **[10]** The defendant contended that the "check" meter was fixed by the plaintiff to verify the readings of the main meter; and that in the event of failure of any one meter, the plaintiff could rely on the other meter in order to read the actual usage of electricity. As for its usage of electricity, the defendant claimed that it did not increase after the "tampering item" was H removed. The defendant says that its usage of electricity was actually not constant as it was dependent on several factors such as the amount of prawns that it had to process at any one time; type of orders by the customers; type of freezing equipment used; and the export destination.

[11] In relation to the second inspection, the defendant claimed that the I meter had broken down on its own on 2 March 2011. The plaintiff came and changed the faulty meter on 16 March 2011. However, on 20 April 2011,

the plaintiff alleged that the defendant had tampered with the meter on 16 March 2011. The plaintiff then issued the defendant a notice that it would be disconnecting the electricity supply to the defendant's premises.

[12] The defendant denied the allegation reiterating its stand that the meter had broken down on its own. On 21 April 2011, the plaintiff disconnected the electricity supply to the defendant's premises. The defendant claimed that it suffered losses as a result of the disconnection and has counterclaimed for such losses.

[13] Aside from a specific denial of any tampering and denial that it had been undercharged by the plaintiff, the defendant pleaded several other defences including the following:

(i) that the search and seizure of 26 January 2011 is unlawful for various reasons such as no notices were served prior to the first inspection; that the plaintiff trespassed the defendant's premises on 26 January 2011; that the plaintiff's had entered the defendant's premises at an unreasonable hour; that no documents were shown by the plaintiff's officers at the material time;

(ii) that both the period and amount claimed is arbitrary, excessive, unreasonable, inaccurate, of no basis or evidence and not in accordance with law;

(iii) that the meter was affixed by the plaintiff itself and the plaintiff owes the defendant a duty of care to ensure that the meter was in working order and condition;

(iv) that the plaintiff was not entitled to make retrospective adjustments for a period of more than three months.

[14] This counterclaim led to a reply and defence to the counterclaim. In essence, the counterclaim is denied with the plaintiff claiming that its inspections were all valid and in accordance with law. The plaintiff relies on in particular, reg. 7 of the Licensee Supply Regulations 1990 and cl. 24 of the Conditions of Supply for Business/Non-Domestic Consumers. The plaintiff denies that the first inspection was a search and seizure but was instead an inspection exercise carried out for the defendant's benefit.

[15] However, the plaintiff now refers to the first inspection as part of an operation called "Ops Mancing" where auxiliary police accompanied the plaintiff's team. The plaintiff claimed that it was reasonable to carry out the first inspection during after office hours as its experience showed that the trend was to steal electricity outside office hours. In any case, the plaintiff claimed that its inspection was in accordance with s. 5 of the Electricity Supply Act 1990 and cl. 24 of the Conditions of Supply for Business/Non-Domestic Consumers.

A **[16]** As for the allegation that it had broken the defendant's gate, the plaintiff alleged that the gate was already broken at the material time. This meant that the plaintiff's team could enter the defendant's premises. The plaintiff claimed that its team who was in uniform denied breaking the lock into meter room. According to the plaintiff, the meter room was only
B latched.

[17] On the matter of the "visitor" who was asked to sign the "Pemakluman Semakan Meter Elektrik", the plaintiff explained that a person by the name of "Raja" had been asked to sign the form because the plaintiff believed him to be in charge of the meter room as he occupied the
C room next to the meter room. Raja accompanied the plaintiff and he witnessed the first inspection.

[18] In relation to the second inspection, the plaintiff claims that upon the defendant's complaint of a faulty meter, the plaintiff sent a meter reader examiner (MRE) to investigate into the complaint. The MRE found
D discrepancies following which the plaintiff sent its seal unit to carry out further detailed investigations. Consequent to its investigations, the plaintiff found that there was again, theft of electricity.

[19] It was as a result of such findings that the electricity was
E subsequently disconnected.

Issues And Determination

[20] Four issues were initially agreed for determination:

1. Whether there were tampering done by the defendant on the meter
F installation which resulted in irregular meter readings during both inspections ie, on 26 January 2011 (the first case) and 16 March 2011 (the second case).

2. Whether s. 5(2) to (6) of the Electricity Supply Act 1990 or reg. 7 of the Licensee Supply Regulations 1990 is applicable in regards to the first
G case.

3. Whether the determination of period of claim as well as the recalculation sum amounting to RM1,632,564.29 as claimed by the plaintiff against the defendant herein is accurate, correct and reasonable.

H 4. Whether the defendant may claim from the plaintiff for damages amounting to RM5,382,139.56 and USD85,000 due to the disconnection of electricity supply on 21 April 2011.

[21] However, a preliminary yet critical issue arose in the course of proceedings; namely whether the plaintiff's claim is sustainable given that it
I did not plead that its cause of action is founded on sub-ss. 38(3), (4) and (5) of the Electricity Supply Act 1990. The answer to this issue may be decisive of the whole claim and counterclaim rendering the four issues unnecessary for determination.

Preliminary Issue: The Plaintiff's Cause Of Action

[22] The plaintiff's claim for the sum of RM1,632,564.29 is a claim for usage of electricity for the two relevant periods prior to the two inspections. It is a claim for the defendant's use of electricity which was not recorded during the relevant periods. This is gathered from paras. 14, 15 and 16 of the amended statement of claim:

> 14. Berdasarkan kepada hasil pemeriksaan tersebut, Plaintif telah membuat pengiraan dan mendapati bahawa terdapat jumlah penggunaan tenaga elektrik yang tidak direkodkan sebanyak RM1,632,564.29 (Kes Pertama) untuk tempoh dari 03 Mei 2007 hingga 26 Januari 2011 dan RM52,582.94 (Kes Kedua) untuk tempoh dari 26 Januari 2011 hingga 16 Mac 2011 termasuk kos operasi yang dihutangi oleh Defendan.
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> 15. Walaupun beberapa peringatan dan notis tuntutan telah diberikan oleh Plaintif kepada Defendan untuk menjelaskan jumlah yang terhutang tersebut, Defendan masih gagal/enggan menjelaskan jumlah yang dituntut.
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> 16. Seterusnya, Plaintif melalui peguamcaranya Tetuan Sidek Teoh Wong & Dennis telah menghantar notis tuntutan bertarikh 19.10.2011 bagi menuntut jumlah penggunaan tenaga elektrik yang direkodkan yang dihutangi oleh Defendan ke dalam kedua-dua kes.

[23] However, in making its case, the plaintiff pivots the whole claim under s. 38 especially sub-s. 38(3) which provides for a claim for loss of revenue; and it sets about proving its case according to sub-ss. 38(4) and (5). This is what s. 38 provide:

> (1) Where any person employed by a licensee finds upon any premises evidence which in his opinion proves that an offence has been committed under subsection 37(1), (3) or (14), the licensee or any person duly authorised by the licensee may, upon giving not less than twenty-four hours' notice, in such form as may be prescribed, cause the supply of electricity to be disconnected from the said premises.
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> (1A) Notwithstanding any other provisions in this Act, where a police officer not below the rank of Assistant Superintendent applies to a supply authority or a licensee for the disconnection of the supply of electricity to any premises for a period not exceeding one calendar month under section 21A of the Common Gaming Houses Act 1953 [Act 289], the supply authority or the licensee or any person authorized by the supply authority or the licensee shall immediately disconnect or cause the supply of electricity to be disconnected from those premises.
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> (2) If the supply of electricity has been disconnected under subsection (1), it shall not be reconnected until the licensee at his discretion gives permission for reconnection:
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> Provided that the period of disconnection shall not exceed three months.

A (2A) Notwithstanding subsection (2), if the supply of electricity has been disconnected under subsection (1A), it shall not be reconnected without the written permission of a police officer not below the rank of Assistant Superintendent.

(3) The licensee may require the consumer to pay him for the loss of
B revenue due to the offence committed under subsections 37(1), (3) and (14) and any expenses incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply.

(4) A written statement by an employee of the licensee duly certified by the licensee or any person authorised by the licensee specifying-
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(a) the amount of loss of revenue or the expenses incurred by the licensee; and

(b) the person liable for the payment thereof,

shall be *prima facie* evidence of the payment that has to be made by the
D consumer under subsection (3).

(5) The amount stated in the written statement shall, within the period specified in the statement, be due and payable to the licensee and in default of payment such amount shall be recoverable by civil action in a court.

E **[24]** The preliminary issue therefore is whether there must be a specific plea that the claim is for loss of revenue under s. 38 of the Electricity Supply Act 1990 (ESA 1990).

[25] The plaintiff has contended that its pleas are adequate and that there
F is no need to make a specific plea since this is a matter of law. Learned counsel for the plaintiff urged the court to accept that the plaintiff's claim is necessarily a claim for loss of revenue and no other. In short, the plaintiff's claim is properly before the court regardless how it is pleaded.

[26] Learned counsel for the plaintiff also contended that its right of
G action is one afforded under contract between the parties. In the course of his submissions, learned counsel has also relied on s. 71 of the Contracts Act 1950 to argue that there has been unjust enrichment.

[27] The defendant contends otherwise. Learned counsel for the defendant argued that this omission has an impact on three critical areas of
H the plaintiff's claim. First, it would not be open to the plaintiff to rely on sub-ss. 38(3), (4) and (5) of the ESA 1990. Second, the plaintiff would also not be able to rely on calculations prepared by one of its witnesses as *prima facie* evidence of the payment that has to be made by the defendant. Third, the plaintiff's claim would be limited to retrospective adjustment of up to
I only three months from the date the defendant is informed of the alleged undercharging of electricity under the proviso to reg. 11(2) of the Licensee Supply Regulations 1990 (LSR 1990).

[28] I agree with the defendant. I am of the view that the right of civil action under s. 38 of ESA 1990 is a specific right expressly given under statute. It is a right to claim for certain losses under certain circumstances. Those circumstances relate to the commission of particular offences under the ESA 1990 where loss of revenue is due to such offence. Where those circumstances or conditions present, a civil action may be initiated to recover the sum payable. The sum or amount payable is proved with certain assistance provided under sub-ss. 38(4) and (5).

[29] Specifically, sub-s. 38(3) refers to a claim for "loss of revenue due to the offence committed under sub-ss. 37(1), (3) and (14) and any expenses incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply". Where that is the claim, sub-ss. 38(4) and (5) provide for the manner in which the claim may be proved. It provides for reliance on a written statement as *prima facie* evidence of the payment that has to be made. This is not unlike a statement or certificate of indebtedness relied on in banking cases as conclusive proof of the indebtedness without the need to lead evidence save where manifest errors are shown.

[30] Subsection 38(3) makes reference to sub-s. 37(1), (3) and (14). This is what s. 37 is all about:

> 37(1) Any person who in manner dishonestly-
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> (a) abstracts electricity;
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> (b) consumes electricity;
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> (c) uses electricity;
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> (d) alters the index of any meter or other instrument used on or in connection with any installation of any supply authority or any licensed installation for recording the output or consumption of electricity; or
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> (e) prevent any such meter or instrument from duly recording the output or consumption of electricity,
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> shall be guilty of an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding three years or to both.

[31] It is quite clear from the statement of claim that the plaintiff's claim is not a claim for loss of revenue but a claim for back charges or charges for the use of electricity which it did not charge or bill the defendant at the material time. Because the plaintiff has chosen to make its whole case on sub-s. 38(3) and rely on sub-ss. 38(4) and (5) to prove its claim; there must be a proper and specific plea with evidence led to show how or whether charges for the use of electricity is revenue to the plaintiff and how such

A revenue is considered a loss to the plaintiff in the particular circumstances of the case. I am not prepared to assume that all charges for use of electricity are necessarily revenue to the plaintiff; certainly not without any evidence to that effect.

B **[32]** In any case, the plaintiff's plea does not make reference to the fact that it is a claim that arises under the circumstances mentioned in sub-s. 38(3); that its loss or revenue is "due to the offence committed under sub-ss. 37(1), (3) and (14)".

C **[33]** It is perhaps opportune to deal with this issue of whether there must be a charge and a conviction under s. 37 before a civil action may be brought under s. 38. At the start of the trial and even by the time of submissions, this issue was still "alive" for consideration as there were several "conflicting positions taken by various courts".

D **[34]** It has since been made quite clear that a claim for loss of revenue may be initiated absent a conviction or even a charge for an offence committed under sub-ss. 37(1), (3) and (14). The position of law here is well settled from several decisions emanating from the Court of Appeal and the Federal Court. First, the decision in *Ichi-Ban Plastic (M) Sdn Bhd v. Tenaga Nasional Bhd* [2015] 10 CLJ 14 where the Court of Appeal cited the Federal Court's decision in *WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd* [2012] 4 CLJ 478 at 486; [2012] 4 MLJ 296 at 301 that:

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> ... there is no legal requirement for there to be a prosecution and conviction first before a claim for loss of revenue is pursued:
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> [7] At the Court of Appeal the appellant's appeal was dismissed on the ground that the relationship between the appellant and the respondent was purely commercial or contractual. As the relationship came within an environment regulated by private law it was not open to the appellant to challenge the respondent's decision by judicial review, which was a public law remedy. In dismissing the appellant's appeal, the Court of Appeal relied on *Claybricks & Tiles Sdn Bhd v. Tenaga Nasional Bhd* [2006] 4 CLJ 892; [2007] 1 MLJ 217. This case relates to an *Erinford* injunction application to prevent the TNB from disconnecting the supply of electricity to the plaintiff's premises. Zulkefli Ahmad Makinudin, JCA (as he was then) when dismissing the appeal remarked:
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> > TNB's s. 38 notice to disconnect the electricity supply for offences enumerated in s. 7 need not prove the offences in court. The reason is that, any purported act to review such act will defeat the swift enforcement under the Act where electricity supply needs to be severed immediately to avoid further illegal usage by the perpetrator. The nature of the act taken by TNB arose from a commercial obligation on the part of the consumer rather that TNB's obligation under public law.

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> [8] Zulkefli Ahmad Makinuddin, JCA also elaborated that s. 38(1) of the Act was enacted to give effective powers to TNB to instantly prevent any offence that may be committed and not to be left unattended or unabated. It provided specifically for the preservation of TNB's interest and empowers TNB to act expeditiously, thereby preventing misuse such as theft of electricity supplied by TNB.
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> [15] It was apparent to us that the Federal Court approved the reasoning of the Court of Appeal in *Claybricks & Tiles Sdn Bhd v. Tenaga Nasional Berhad*, *supra*.

[35] The Court of Appeal applied the Federal Court's decision although it recognised that the Federal Court's decision concerned an issue of disconnection of electricity supply and in the context of judicial review. The Court of Appeal expressed the view that the principle applies even in cases involving a claim for loss of revenue under sub-s. 38(3). The Court of Appeal further pointed out that another panel of the Court of Appeal "has reaffirmed the correct position in *Sumbang Projeks Sdn Bhd v. Tenaga Nasional Bhd*, since reported in [2014] 4 CLJ 323". Therefore, it is clear that a civil action for recovery of loss of revenue may be pursued regardless of whether there has been a charge or a conviction for the offences mentioned in s. 37.

[36] On the facts of this case, there has been no charge, let alone a conviction. Although this does not affect the validity of the plaintiff's claim, the lack of specific plea with no reference to any of the circumstances under s. 37 or even a plea that the plaintiff has suffered a loss of revenue (kerugian hasil); this present claim cannot be treated as one within the meaning, purpose and intent of the ESA 1990. It is merely a claim for back charges under the contract.

[37] For a claim for loss of revenue under sub-s. 38(3) which is a statutory cause of action, there must be specific plea with evidence to that effect; that there is a statement issued under sub-s. 38(4) even if it was sent in the form of a notice. There is none. Yet, the plaintiff makes s. 38 as the whole basis of its claim in this case. On this score alone and for the reasons explained, the plaintiff's claim should stand dismissed; and the court in fact need not deal with the arguments under s. 38.

[38] Further, one must not lose sight of the fact that any claim for loss of revenue is first and foremost for loss of revenue due to the commission of any of the specified offences, that is, under sub-ss. 37(1), 37(3) or 37(14); and not for all the offences listed in s. 37. While a charge or a conviction may not be necessary to maintain such a civil right of recovery, there must be, at the very least, evidence of a commission of those specified offences. The plaintiff's right to recovery by way of a civil action is ancillary or consequential to the existence of any of the specified offences. This is clear,

too, from the terms of sub-ss. 38(1) and (3); that the plaintiff has to find "upon any premises evidence which in his opinion proves that an offence has been committed under s. 37(1), 37(3) or 37(14)".

[39] Finally, I must add that the argument of unjust enrichment cannot be taken up since that, too, was not pleaded. The only basis for the claim would be one in contract since the underlying relationship between the parties is one of contract. The subject matter of the contract is the supply of electricity by the plaintiff to the defendant for which the defendant agreed to pay for what was supplied, used or consumed. If what has been used or consumed has not been paid, then a claim for non-payment of electricity used may be made.

[40] Hence, on this issue alone, the plaintiff's claim must fail. The issue of whether there was tampering as alleged in both instances as well as whether the plaintiff is entitled to recover beyond three months from the receipt of notice pursuant to reg. 11(2) of the LSR 1990 are consequently immaterial.

[41] What is and what remains relevant is the validity of the two inspections; and the position of any evidence gathered from such inspections. This is because of the existence of the defendant's counterclaim.

Whether s. 5(2) To (6) Of The Electricity Supply Act 1990 Or Reg. 7 Of The Licensee Supply Regulations 1990 Is Applicable In Regards To The First Case: Validity Of The Two Inspections

[42] The second issue posed concerns the validity of the two inspections. For this, we need to examine whether s. 5 of the ESA 1990 or reg. 7 of the LSR 1990 applies to the two entries or two inspections. Ancillary to this is the question of whether the evidence gathered from any illegal inspections or searches may still be used or relied on as evidence to prove the plaintiff's claim in these civil proceedings.

[43] It is the plaintiff's case that s. 5 of the ESA 1990 does not apply to the facts of the case. The plaintiff relies instead on reg. 7 of the LSR 1990 as validating its two inspections. The plaintiff further contends that even if the entries are unlawful, any evidence gathered from any invalid searches or inspections may still be relied on in these proceedings.

[44] The defendant contends that the reg. 7 does not apply and that the plaintiff is necessarily required to act under s. 5 of the ESA 1990. Since the plaintiff did not act under s. 5 nor did the plaintiff comply with the requirements of s. 5, the two inspections are unlawful. Consequently, the items seized during the two inspections are not admissible and cannot be relied on as proof of the plaintiff's allegations against the defendant in these civil proceedings.

[45] The facts surrounding the two inspections are distinctly different. In relation to the first inspection, the evidence of Farid bin Abd Kader (PW1), a technician with the plaintiff is relevant. PW1 is attached to a unit known as the "SEAL Unit"; that is, a unit dealing with "Special Engagement Against Losses". He told the court that he was generally assigned to conduct inspections and to examine all meters as well as TNB's meter installations.

[46] On 26 January 2011, PW1 led a team of four persons including himself to "conduct an inspection of the meter installation at the said premise" upon "receiving instructions from his superior", one Tuan Haji Amin. The team entered the said premise at approximately 4.30am to 6am (see pp. 21 to 24 of Bundle A Part 1 and p. 19 of Bundle A, Part 2). At that hour of the morning, the defendant and its local staff were not present at the said premise. The only workers of the defendant who were on site at that time and who contacted DW1 were foreign workers residing at the said premise.

[47] PW1 testified that the team arrived at the defendant's premises together with auxiliary police (polis bantuan). After being assured by the auxiliary police officers that the place was safe (keadaan selamat), the team "masuk ke perkarangan premis tersebut". The team found the gate to the defendant's premises locked and guarded. The auxiliary police then looked for another way in order to avoid alerting the guard to the team's presence (untuk mengelakkan pengawal tersebut menyedari ketibaan pasukan kami). It would appear from PW1's testimony that the team gained entry to the defendant's premises first through a broken perimeter chain wire fence.

[48] PW1 told the court that from his experience, if the guard was alerted, it was more than likely that the guard will remove the any evidence of meter tampering, if there was tampering in the first place. Hence, it was necessary for the team to enter without the guard knowing.

[49] Based on the said inspection by his team, PW1 testified that he found evidence of tampering of the defendant's meter installation, details of which are recorded in the Borang Pemeriksaan Meter LPC Voltan Rendah (see pp. 21 and 22 of Bundle A):

(i) the power readings on the display of the main meter and the check differs from the actual power consumption readings for all three phases;

(ii) there was a copper clamp fixed at the bottom side of the Test Terminal Block ("TTB");

(iii) the said copper clamp was used in order to reduce the readings of the power usage into the meter; and

(iv) a piece of plastic and tissues were used to avoid contact of the said copper clamp with the meter panel (to avoid scratch marks on the TNB meter installation).

[50] For the second inspection, the team was led by Sharhan Effendy bin Abu Kamim (PW2). Like PW1, PW2 is also a technician and is attached to the SEAL Unit having the same responsibilities. He also led a team of four including himself to the defendant's said premises on 16 March 2011 after being instructed by 'pihak atasan' through a work order seen at p. 78 of IDB Vol. 1. PW2 and team went at around 2.30 in the afternoon. He testified that the team went to inspect the meter installation following a complaint of a faulty meter by the defendant.

[51] When PW2 and his team entered the defendant's premises, PW2 met with the defendant's representative, one Encik Kamarul at the defendant's office. Kamarul took PW2 and the team to the main switch board (MSB) room where the meter installation was located. Upon inspection, PW2 testified that the team found that there had been tampering of the meter:

(i) there was a mark on the TNB sticker which suggested that it was tampered with;

(ii) the power reading on the red phase of the main meter is 0 amp whilst the yellow and blue phases of the readings are in reversed;

(iii) the power readings for all three phases of the check meter is 0 amp while the voltage reading for the yellow phase is 0 amp;

(iv) the neon fuse of the yellow phase had blown.

[52] In both cases, the plaintiff took corrective measures after conducting tests on the meters.

[53] The plaintiff maintains that its entry on both occasions is lawful under reg. 7 of the LSR 1990 and it cites the decision in *Yu-Ai Food Industries v. Tenaga Nasional Berhad* (Kuala Lumpur High Court Civil Suit No: 22NCVC-783-2011) (Unreported) in support. It is the plaintiff's case that its entry at 6am in the first inspection is "reasonable" based on *Yu-Ai Food Industries*. Pursuant to reg. 7, the plaintiff submits that it is not required to obtain a warrant from the Magistrate's Court prior to conducting the inspection at the defendant's said premise.

[54] The plaintiff also maintains that s. 5 of the ESA 1990 does not apply. As a licensee, it does not fall within the meaning of the term "authorised officer" in sub-ss. 5(1) and (2). Hence, it was not open to the plaintiff to act under s. 5 of ESA 1990.

[55] According to the plaintiff, a further reason why s. 5 does not apply is because its SEAL team entered the defendant's said premise to conduct inspections on the defendant's meter installation without any knowledge or information of tampering prior to entering the said premise. It was whilst conducting the inspection that the clamp was discovered. In other words, the plaintiff was not conducting "a search or a seizure", but "merely an inspection". Learned counsel submitted that the collection of physical and

photographic evidence was merely the gathering of evidence to prove its case in a civil court and that was suggested to be within the purview of reg. 7. In any event, even if the clamp or any other piece of evidence has been illegally obtained, the plaintiff submits that it is still entitled to rely on such evidence and it relies on the Court of Appeal's decision in *Lim Lean Heng v. Wako Merchant Bank (Singapore) Ltd & Other Appeals* [2004] 3 CLJ 9.

[56] The plaintiff accepts that it does not have the power or authority to prosecute its customers for any of the criminal offences found under ESA 1990; especially ss. 37 and 42. That power lies with the Energy Commission under s. 6. The plaintiff accepts further that its recourse in circumstances such as those presented in this case is to make a police report, disconnect electricity supply under s. 38; and to commence a civil action under s. 38 to recover any loss of revenue due to the criminal offence committed under ss. 37 and 42. The plaintiff further relies on the conditions of contract which specifically authorises entry into the defendant's premises.

[57] The defendant's contention is that the search and seizure conducted on 26 January 2011 is unlawful for the following reasons:

(i) the search and seizure were made without a warrant;

(ii) the search and seizure were not conducted by an "authorised officer" (as defined in the ESA 1990) or police officer not below the rank of Inspector; and

(iii) the search and seizure was in breach of sub-s. 5(2) of ESA 1990 because it was carried out at an unreasonable time.

[58] The defendant submitted that as the plaintiff's claim is premised on the findings and evidence discovered during the search on 26 January 2011, the claim must fail by reason of the unlawful search and seizure. It was further submitted that there was a break in the chain of evidence in respect of the handling of the clamp purportedly discovered during the search and seizure on 26 January 2011. That being so, it would be manifestly unsafe to rely on that evidence for the purposes of determining whether there is a breach of sub-s. 37(1), (3) or (14) of the ESA 1990.

[59] As pointed out earlier, the underlying relationship between the plaintiff and the defendant is one based on contract. The right to enter the defendant's premises would be reserved in the conditions of contract. Here, it would be cl. 24 as correctly pointed out by the plaintiff:

> 24. The Consumer agrees with TNB that the authorised employees, servants, agents and/or representatives of TNB shall be permitted to have access to the premises at any reasonable time to carry out his duties/ inspection and/or test for the purpose of this Agreement.

[60] Clause 24 clearly is a term of the contract made between the parties authorising the plaintiff to enter the defendant's said premise. However, such entry is only "at any reasonable time" and even then, it is to allow the plaintiff's "employees, servants, agents and/or representatives" to "carry out his duties/inspection and/or test for the purpose of this Agreement". It is my view that cl. 24 only permits entry for routine matters and matters related to the agreement; and no other. An entry for any other purpose must find validity in some statute; including subsidiary legislation. One such subsidiary legislation is reg. 7 of the LSR 1990.

[61] From my reading of reg. 7, the plaintiff's right to enter the defendant's premises is again limited. The plaintiff may only enter the defendant's premises for the purpose of routine inspections:

> 7. Any officer authorized by a licensee may at all reasonable times, on the production of any duly authenticated document showing his authority, enter any premises to which a supply of electricity is being given by the licensee, or by another licensee (wholly or partly) through the first-mentioned licensee's supply lines and electrical equipment, for any of the following purpose, namely:
>
> (a) inspecting any supply line or electrical equipment belonging to the licensee;
>
> (b) ascertaining the register of any electricity meter; or
>
> (c) removing inspecting or re-installing any electricity meter or installing any substitute meter.

[62] I am aware that in the decision of *Tenaga Nasional Berhad v. Api-Api Aquaculture Sdn Bhd* [2015] 1 LNS 65; [2015] AMEJ 289, Justice Wong rejected the defendant's contention that reg. 7 applies to only routine inspections because of what he viewed as 'clear wording of reg. 7'. His Lordship further found that there was "nothing in reg. 7 which requires the plaintiff" to "give prior notice of the inspection to the customer" as "the giving of notice before an inspection makes the inspection an act of futility" citing yet another *TNB* case; that of *Tenaga Nasional Bhd v. AWP Enterprise (M) Sdn Bhd* [2015] 1 CLJ 400, a decision of the Court of Appeal.

[63] It was also suggested that reg. 7 should not be given a narrow construction as it "will impede the effective functions of the plaintiff and this in turn may cause hardship to the plaintiff's customers if the plaintiff cannot enter the premises to inspect, repair, remove and re-install any electricity meter for the benefit of the plaintiff's customers. Furthermore, the plaintiff should have the power under reg. 7 LSR to enter premises to conduct surprise inspection so as to curb electricity theft".

[64] With respect, I cannot agree. An inspection is an inspection; it cannot be anything else. In the case of reg. 7 and cl. 24 of the contract of supply, the object of the inspection is already spelt out. None of the specified

objects or purpose of inspection come close to the true purpose of the entry into the customer's premise in cases such as the instant case before the court, which is to either find the commission of an offence or to gather evidence of the commission of an offence. With the express presence of s. 5 of the ESA 1990, which is specifically enacted for such purpose(s), reg. 7 and even reg. 4 cannot be a ruse for such entries. As expressed earlier, it is for the plaintiff to work with the Energy Commission or any other appropriate body for a solution; suffice to say that the provisions of law relied on simply do not hold the weight of or serve the true intent of the entry such that the inspection is now coloured and invalidated.

[65] The plaintiff itself recognises this limited right of entry as evidenced from its own internal guidelines issued specifically for such purposes. Those guidelines are the C1/2006 Guidelines on Customer Service and Sales (Panduan Perkhidmatan Pengguna dan Pemasaran Bil C1/2006 - Panduan dan Prosedur Pengekangan Kecurian Tenaga Elektrik) (C1/2006 Guidelines on Customer Service and Sales) found in Bundle A4, in particular para. 5.3.1(a). Even where the plaintiff wishes to enter the defendant's premises, the plaintiff is required to obtain the prior consent of the defendant.

[66] This is evident from para. 5.3.1(c) of the same guidelines:

> 5.3.0 Prosedur Menguatkuasakan Seksyen 38 ABE 1990
>
> 5.3.1 Memasuki Premis Pengguna
>
> (a) Kemasukan ke premis pengguna boleh dibuat atas alasan untuk menjalankan "routine inspection" pada pepasangan. Kemasukan boleh dibuat di bawah peruntukan Peraturan 7, Peraturan-Peraturan Bekalan Pemegang Lesen (Peraturan) 1990. Peraturan ini memperuntukan kuasa untuk TNB melakukan tindakan memeriksa, mengalih dan menggantikan pepasangan dan peralatan TNB di dalam suasana dan persekitaran tugas-tugas lazim. Butiran lengkap peruntukan peraturan tersebut boleh dirujuk di lampiran 6.a.
>
> (b) Kemasukan ke premis pengguna hendaklah menggunakan kad kuasa TNB dan adalah memadai jika seorang sahaja anggota kerja TNB yang memegang kad kuasa berkenaan. Beliau boleh membawa masuk bersama-samanya anggota kerja lain seramai yang perlu sebagaimana yang telah diperuntukan di bawah Peraturan 10 (2), Peraturan 1990. Permohonan untuk mendapatkan kad kuasa TNB boleh dibuat kepada Ketua Perkhidmatan Keselamatan TNB Ibu Pejabat melalui Ketua Jabatan masing-masing.
>
> (c) Anggota kerja TNB tidak boleh memasuki premis pengguna tanpa mendapat kebenaran dari pengguna atau wakilnya. Maklumkan kepada pengguna tujuan pemeriksaan dengan menunjukkan surat pemberitahuan pemeriksaan sekiranya ada seperti di lampiran 6.b.

A **[67]** Paragraph 5.3.1(c) is emphatic in its terms that the plaintiff cannot enter the defendant's premises without first securing the defendant's permission or consent. At the time of entry, the plaintiff is also required to show his authorisation card and to inform the defendant the purpose of the entry. If there is already a prepared letter for that purpose, then that letter B is to be shown to the defendant. "Lampiran 6.b" is a template or format for such a letter. It shows quite clearly that the purpose of entry is to carry out inspection and testing of meters installed and not for any other hidden, ulterior or collateral purpose – see p. 802 of Bundle A4.

[68] Whether the entry is pursuant to cl. 24 of the contract or regulation C 7, the entry is subject to the condition of "reasonable times"; and that it must be for the object or purpose of a routine inspection. It is the finding of this court that the first inspection was nowhere near the meaning of a routine inspection that the plaintiff would like the court to believe. The facts as candidly testified by the plaintiff's own witness, PW1, show that the first D inspection was actually part of "Ops Mancing". PW1 testified that the plaintiff was already suspicious of the offence of tampering of meter in the defendant's said premises before the time of entry. Under such circumstances, it is undeniable that the entry on 26 January 2011 was deliberately made without the defendant's knowledge and consent as it was E a "pemeriksaan mengejut", "pemeriksaan luar biasa" and was without the knowledge of the defendant's guard – see Q&A 10 to 12 of PW1's witness statement.

[69] I, cannot, in such circumstances accept that the plaintiff's entry was for the purpose of a routine inspection, as now claimed. Actually, the mere F suggestion that it is, flies in the face of clear evidence to the contrary from the plaintiff's own witnesses. Such suggestion further borders on questionable conduct on the plaintiff's part.

[70] As for the time of entry, I also cannot accept that the hours of entry of the first inspection are reasonable hours. Where the plaintiff enters the G defendant's premises by reason of the contractual arrangements or under reg. 7, the object of the entry gives context to the term "reasonable times". It would be quite unreasonable to carry out a routine inspection of meters, lines or installations in the middle of the night or the wee hours of the morning, as was the case here. I cannot see why such work cannot be carried H out during more reasonable hours of daylight.

[71] Where the real purpose of the entry is because of a suspicion of an offence being committed as is the case here (denoted by the name of the exercise "Ops Mancing"), the proper course of action is to proceed under s. 5 of the ESA 1990. Section 5(2) of the ESA 1990 provides:

I

(1) An authorised officer may, for the purposes of discharging any of his duties or carrying out any of his functions under this Act or any regulation thereunder, or otherwise for any of the purposes of this Act or any regulation, enter at any reasonable time upon any land, house or building with or without supply of electricity to inspect and examine any part of an installation or equipment, or for any other proper cause.

(2) In every case where information is given on oath to any magistrate that there is reasonable cause for suspecting that there is in any land, house or building any article, thing, book, document, installation or part thereof used or intended to be used in relation to which any offence under this Act has been committed, he shall issue a warrant under his hand by virtue of which any authorised officer or police officer not below the rank of Inspector named or referred to in the warrant may enter the land, house or building at any reasonable time by day or night, and search for and seize or seal any such article, thing, book, document, installation or part thereof:

Provided that if an authorized officer or police officer not below the rank of Inspector is satisfied upon information received that he has reasonable grounds for believing that by reason of delay in obtaining a search warrant, any article, thing, book, document, installation or part thereof used to commit or to be used to commit an offence under this Act is likely to be removed or destroyed, he may enter such land, house or building without a warrant and seize or seal any such article, thing, book, document, installation or part thereof from therein.

(3) An authorised officer or a police officer not below the rank of Inspector making the search may seize any article, thing, book, document, installation or part thereof used or intended to be used or capable of being used for the purpose of committing an offence under this Act and if such article, thing, book, document, installation or part thereof is seized, he shall produce the same before the magistrate, and upon such production the magistrate shall direct the same to be kept in the custody of the authorized officer or the police for the purpose of any investigation or prosecution under this Act.

(4) Any authorised officer or police officer not below the rank of Inspector may in the exercise of his powers under subsection (2) or (3), if it is necessary so to do -

(a) break open any outer or inner door of the dwelling house or any other premises and enter thereinto;

(b) forcibly enter the place and every part thereof;

(c) remove by force any obstruction to entry, search, seizure and removal as he is empowered to effect; and

(d) detained every person found in the place until the place has been searched.

A (5) The authorised officer or police officer not below the rank of Inspector seizing any article, thing, book, document, installation or part thereof under subsection (2) or (3) shall prepare a list of the things seized and forthwith deliver a copy signed by him to the occupier, or his agents or servants present in the premises and if the premises are unoccupied, such authorised officer or police officer shall wherever possible post a list
B of the things seized on the premises.

(6) An authorised officer shall at all times carry an official identification card or badge in such form as may be prescribed, and no person shall be obliged to admit to his land, house or building any person purporting to be an authorised officer except upon production of the identification card
C or badge.

[72] Subsection 5(1) refers to the right of entry of an "authorised officer". The purpose of the entry is in relation to the authorised officer's discharge of any of his duties or carrying out any of his functions under ESA 1990 or LSR 1990 or "for any other proper cause". Such entry nevertheless must also
D be "at any reasonable time upon any land, house or building with or without supply of electricity to inspect and examine any part of an installation or equipment".

[73] The right of entry under s. 5 is only accorded to an "authorised officer" who is defined in s. 2 to mean "any public officer or officer of the
E Commission who is authorised in writing by the Minister for the purposes of this Act". Since the plaintiff is only a licensee, it accepts the fact that it does not fall within the definition of "authorised officer"; and that is the correct position under the law.

F **[74]** That, however, does not mean that s. 5 does not apply and that the plaintiff may resort to reg. 7, especially where its real purpose of entry is to search the defendant's premise for evidence of tampering and not, to carry out a routine inspection of its installations. If in the course of a routine inspection the plaintiff literally "stumbles upon evidence of tampering", the plaintiff already has its own guidelines of the procedure to be adopted in its
G C1/2006 Guidelines on Customer Service and Sales on the appropriate procedure. Where the plaintiff has every intention of doing more than a routine inspection, the plaintiff would certainly open itself to questionable conduct if it were to do so under the guise or pretext of reg. 7; or even cl. 24. It is for the plaintiff to bring itself within the folds of s. 5. How it does
H so, co-ordinating with the Electricity Commission is one for the plaintiff and not the court, to resolve. The legislation intends such entries to be by way of s. 5; and the plaintiff cannot avoid such procedure laid down under the ESA 1990.

I **[75]** The plaintiff has proffered another reason why it says s. 5 does not apply – that it is because there was no search and seizure on the facts. The plaintiff claimed that the entry was to gather evidence for use in civil suits such as the present. Therefore, the entry was lawful.

[76] With respect, the court disagrees. Neither reg. 7 nor cl. 24 permit the plaintiff to enter the defendant's premises for the purpose of evidence gathering. That is quite clear from the terms of both the regulation as well as the contractual arrangement between the parties. Where the plaintiff is seeking to enter the defendant's premises because "there is reasonable cause for suspecting that there is in any land, house or building any article, thing, book, document, installation or part thereof used or intended to be used in relation to which any offence under this Act has been committed", sub-s. 5(2) requires the plaintiff to secure a warrant prior to entry. Of course, if obtaining a warrant may cause a delay and that "any article, thing, book, document, installation or part thereof used to commit or to be used to commit an offence under ESA 1990 is likely to be removed or destroyed, then the authorised officer or police officer not below the rank of Inspector may enter the premise without a warrant". Upon entry, the authorised officer or police officer may seize or seal any article, thing, book, documents, installation or part thereof from herein.

[77] Applying these principles, it is apparent that the first inspection does not pass muster while the second inspection is lawful. In the case of the first inspection, quite aside from the real purpose of entry into the defendant's premises which this court has already found to be outside the terms of reg. 7 and that a warrant under sub-s. 5(2) was in fact required; the court also finds that the plaintiff's team had failed to identify themselves at the material time by producing their letters of authorisation. Furthermore, PW1 claimed that the relevant documents related to the entry (Borang Pemeriksaan Meter LPC Voltan Rendah) as shown at p. 23 of IDB Vol. 1 were explained to the defendant's representative, a person by the name of Raja who then signed or acknowledged that form.

[78] The defendant has led satisfactory evidence to show that the inspection cannot be lawful. At the material time, Ting Kwong Seng (DW1), the defendant's supervisor was not even at work. He came to the factory after receiving a telephone call from one of the workers around 5 or 6 in the morning that there were a few people at the factory but he did not know who they were. When he arrived at the defendant's premises, he was informed by the plaintiff's team that it was only a routine inspection and so he did not attend to them. He then went to his office to work.

[79] As for "Raja", Saw Leng Hean (DW4) the defendant's previous General Manager testified that Raja's full name is actually "Raja Ramadoss". He is not one of the defendant's workers but a friend of one of its workers called Shanmugam Jayaraman India. DW4 testified that Raja had visited Shanmugam on 25 January 2011 and had "stayed for the night". However, on 26 January 2011, when he awoke early in the morning to go to the toilet, he was stopped by the plaintiff's staff. They forced him to sign the report dated 26 January 2011. If he doesn't sign it, they said they will bring him to the police station".

[80] The court accepts DW1 and DW4's testimonies on these events. The court finds them truthful on these matters which are furthermore corroborated by two police reports; one made that same day by the defendant's manager, Ting Lai Ong (p. 19 CBD A); the other, the day after by Shanmugam (see p. 18 CBD A). In Ting's report, he complained that the plaintiff's workers had trespassed on to the defendant's property by tearing down the defendant's fence and that they had forced a friend of one of the workers to sign the plaintiff's documents. Shanmugam's report was also about his friend being forced to sign the plaintiff's documents. His friend, Raja further affirmed a statutory declaration on 10 February 2011 to declare that he is not the defendant's worker and that he was forced to sign the plaintiff's documents – see p. 18 of CBD A. Shanmugam did not testify as he has since left the country.

[81] In view of the foregoing, the court finds that sub-ss. 5(2) to (6) of the ESA 1990 and not reg. 7 of the LSR 1990 apply in relation to the first inspection. And, in light of the evidence and provisions of the law examined, the court finds that the first inspection was indeed unlawful.

[82] As for the second inspection, it was on the occasion of the defendant's own complaint of a faulty meter. The existence of this complaint is confirmed by the defendant's own witness, Mhd Sidin bin Taukhit (DW3). DW3 testified that on 2 March 2011, he had entered the defendant's premises in his capacity as a meter reader examiner (MRE), to read and record the monthly usage of electricity in the defendant's premises. He is the MRE that reads the defendant's meter every month. On 2 March 2011, he noticed that the fuse was burnt and that there was no display on the meter. He concluded that the meter was burnt or faulty. He then issued an estimate bill and filed a report of the same with his head of department (Ketua Jabatan Teknikal). DW3 also testified that the meter was not faulty in February when he last read the meter; and that the meter 'selalu ada rosak'.

[83] PW2's testimony of being shown the MSB room by one Kamarul is true in that the defendant indeed has such an employee. In fact, Kamarul whose full name is Kamarul Izwan bin Muhri testified as DW2. He was the defendant's Senior Sales Coordinator at the material time. He confirmed the inspection by PW2 and team; and that it was he who unlocked the MSB room for PW2 and his team. DW2 further testified that the team informed him at the material time that the "meter rosak" upon their examination.

[84] DW2 was also present when the plaintiff went to the defendant's premises on 21 April 2011 to disconnect the electricity supply to the defendant's premises. He was the defendant's representative together with another called Ang who went to the plaintiff's office to appeal against the disconnection of electricity supply and to ask for a re-connection of supply.

[85] From the evidence of PW2, DW2 and DW4, it may be reasonably concluded that the plaintiff's second inspection or entry into the defendant's premises is legitimate and not on some pretext. Although DW4 claimed that the defendant was "under the impression that the plaintiff was replacing spoilt meters after being informed by Mhd Sidin bin Taukhit"; that it was not given any "Borang Pemeriksaan Meter LPC Voltan Rendah"; and that it "was not aware that the plaintiff was alleging that the defendant had tampered with the meters until the defendant received the plaintiff's notice to cut electricity"; this does not make the plaintiff's reason for entering the defendant's premise any less legitimate or valid. PW2 was at the premise to conduct a "pemeriksaan lanjutan" which is consistent with the defendant's complaint of a faulty meter.

[86] The second inspection is therefore valid and in accordance with reg. 7.

Evidence Gathered During Unlawful Inspections

[87] What then is the position of any evidence that may have been gathered by the plaintiff in the course of such inspections?

[88] The defendant has relied on several decisions to support its submissions that the evidence gathered in an unlawful search is inadmissible: the Scottish decision of *Stephen David Johns v. Robert T Hamilton (Procurator Fiscal, Dumberferline)* 1988 SCCR 282, the Irish High Court's decision in *Competition Authority v. Irish Dental Association* [2005] 3 IR 208; and our local case of *Public Prosecutor v. Then Mee Kon; Public Prosecutor v. Chan Kam Lai* [1983] 1 LNS 31; [1983] 2 MLJ 344. In *Stephen David Johns*, the police had conducted a search in a private premise on suspicion of drugs sans warrant. The High Court allowed the appeal on conviction on the basis that the police had no right to be in the appellant's home without a warrant. The court found such evidence to be inadmissible. Similarly, in *Competition Authority v. Irish Dental Association*, evidence obtained in a search found to be a deliberate and conscious breach of the defendant's constitutional rights such as a right to privacy was excluded by the court. In *Public Prosecutor v. Then Mee Kom*, the High Court was of the view that video tapes seized without a search warrant was a "serious illegality rendering the search and seizure of the video tapes illegal" in which case subsequent related proceedings were also rendered invalid.

[89] With respect, the court disagrees. For this, it must be borne in mind that the present proceedings are civil and not criminal proceedings. This important distinction was noted by the Court of Appeal in *Lim Lean Heng v. Wako Merchant Bank (Singapore) Ltd & Other Appeals* (*supra*). The Court of Appeal cited with approval Millett LJ's decision in *Bell Cablemania Plc v. Simmons* [2002] FSR 34:

A Unable to rely upon privilege or confidentiality, the defendant has sought to invoke the ancient jurisdiction of a court of equity to relieve against the consequences of mistake and accident. The attempt is in my opinion misconceived. The common law has always set its face against preventing a party to civil proceedings from adducing inadmissible evidence even where it has been improperly obtained: *Calcraft v. Guest* [1898] 1 QB 759 but on the contrary has applied it to proceedings in its own courts. It is significant that in *Ashburton v. Pape* the equitable jurisdiction was firmly based on confidence and not upon any wider principle of fair play in litigation. But in any case the defendant's mistake, as I have already pointed out, is not the kind of mistake in respect of which a court of equity would ever grant relief. It will not protect a dishonest man from the consequences of mistakenly disclosing evidence of his dishonesty.

[90] Just because the evidence was not properly gathered or were gathered in an unlawful entry to the defendant's premises does not without more, render the evidence inadmissible in these civil proceedings. The court must set its face against such arguments.

[91] In the circumstances, I am of the opinion that any evidence gathered from the first inspection is still admissible.

Whether There Were Tampering Done By The Defendant On The Meter Installation Which Resulted In Irregular Meter Readings During Both Inspections ie, On 26 January 2011 (The First Case) And 16 March 2011 (The Second Case)

[92] Although I had earlier remarked that it is immaterial for the court to determine whether or not there has been tampering and whether reg. 11(2) of LSR 1990 applies, for the sake of completeness, I shall deal with these two matters.

[93] On the question of whether there is evidence of tampering of the meter installation, I am satisfied on a balance of probabilities that there is evidence of tampering in the first inspection.

[94] The defendant has sought to offer that there is a break in the chain of evidence in respect of the handling of the clamp that was purportedly discovered during the first inspection. Learned counsel for the defendant submitted that the clamp must be produced before a magistrate as required under sub-s. 5(3) of the ESA 1990 – see *Chong Chieng Jen v. Mohd Irwan Hafiz Md Radzi & Anor* [2010] 1 CLJ 355. Since it was not, there is a break in the chain of evidence. It was further submitted that there was a failure to document the movement of the claim from PW1 to the person who kept the clamp. The latter was not called to testify in which case, an adverse inference ought to be drawn under s. 114(g) of the Evidence Act 1950.

[95] Having heard the evidence of PW1, Zahrul Effendy bin Shahid (PW3), one of the plaintiff's Penolong Pengurus Perkhidmatan Pengguna dan Pemasaran; and Kamarul Azam bin Abu Kassim (PW5), a Jurutera Utama (Ahli Pasukan Transformasi, Jabatan Transformasi) with the plaintiff, I

disagree. I am amply satisfied that the meter installation in the defendant's premises had been tampered at the material time of the first inspection. There is the irrefutable presence of the clamp tendered as exh. "P1". This clamp was found on the meter installation at the defendant's premises. The clamp is not a part of the meter installation by the plaintiff and serves no function in the ordinary supply of electricity to the defendant's premises. It also does not appear to be the plaintiff's property.

[96] According to PW1, the clamp when affixed to the meter results in irregular meter readings and the actual electricity usage is then not recorded. In other words, the clamp tampers the meter. I find PW1 truthful in this respect. I also believe PW1 when he testified that the clamp produced in court as exh. P1 is the same clamp that he saw at the defendant's premises at the time of the first inspection. A report of the first inspection can be found at pp. 21 and 22 of Bundle A Part 1.

[97] PW1's evidence is corroborated by the photographs taken at the material time of both the meter installation and the clamp; and by the evidence of PW3 and PW5. Both these witnesses have explained how the reverse power indicators on the meter will not appear unless there is tampering. Where the meter is broken or "rosak", PW5 explained that there will be a blank screen with no values shown. Here, there is a value on the screen. I find PW5 knowledgeable and credible. His evidence is also consistent with what the manufacturer's manual advised.

[98] There is no evidence led by the defendant to either explain away or contradict these testimonies although both witnesses were subjected to considerable detailed cross-examination by the defendant's counsel. Despite such efforts, their testimonies were largely and materially intact. Hence, with no explanation to account for the presence of the clamp in the first place; and with the testimonies of the plaintiff's witnesses, on a balance of probabilities, the court finds that the meter on the defendant's premises was tampered at the time of the first inspection.

[99] As for the second inspection, the court has earlier found the entry and the inspection to be lawful. Arising from the second inspection, the plaintiff's claim is for the sum of RM52,582.94.

[100] On the matter of tampering, I am not satisfied that the meter installation has been tampered on this second occasion. On the same balance of probabilities, the court accepts that the meter was in fact faulty especially from DW3's evidence. DW3 went to the defendant's premises on 2 March 2011 to record the monthly readings of the defendant's meter. He testified that he was unable to read the defendant's meter on that particular day as the meter display was blank and he believes that the meter was broken. DW3 followed that finding with a report to the Head of the Technical Department noting the broken meter.

[101] DW3's report to the plaintiff that the defendant's meter was faulty is not only proximate in time in relation to the second inspection, it is genuine. It led to the second inspection. DW3 is an experienced personnel of the plaintiff; he testified that he encountered faulty meters every month making the defendant's not surprising. Furthermore, there is the evidence of PW2. After he had inspected the meter, he had also told DW2 that the meter was faulty.

[102] Therefore, there was no tampering in the case of the second inspection.

Whether The Determination Of Period Of Claim As Well As The Recalculation Sum Amounting To RM1,632,564.29 As Claimed By The Plaintiff Against The Defendant Herein Is Accurate, Correct And Reasonable

[103] The next issue concerns the period of claim which may be validly made by the plaintiff. Puan Moliza binti Mohamad Yusof (PW4), one of the plaintiff's "Pembantu Tadbir" testified that it was she who prepared an adjustment statement for the said recalculation and costs of losses involving these two inspections – see p. 29 of Bundle A Part 1. She has worked with the plaintiff for 18 years. Her job is to recalculate any undercharges in cases where the meter had been tampered.

[104] Her method of calculation was confirmed by her superior, one Mr Shamsulkamar, who did not testify. In her calculations, PW4 had adopted the load factor formula and arrived at the figure of RM1,632,564.29 which is to be paid by the defendant.

[105] The real argument here is about the applicability of reg. 11(2) of the LSR 1990. Regardless the method of calculation, the defendant maintains that the plaintiff is not entitled to recover any retrospective adjustments in the consumption and demand of the amount of electricity beyond three months from the receipt of notice pursuant to reg. 11(2) of the LSR 1990. In short, the plaintiff's claim is limited to three months adjustments. The plaintiff contends that reg. 11 does not apply and it can claim for the sum ascertained.

[106] Sub-regulation 11(2) reads as follows:

> (2) The reading of the consumer's meter shall be *prima facie* evidence of the amount of electricity consumed, provided that in the event a consumer has been uncharged or overcharged as a result of:
>
> (a) meter inaccuracy;
>
> (b) malfunctioning of the meter or its associated installation or part thereof;
>
> (c) incorrect meter reading;

(d) incorrect application of a meter applying constant;

(e) cross-connection of installation to different accounts; or

(f) faulty installation,

the licensee shall make retrospective adjustments to the consumer's account in respect of consumption and demand for such period by taking into consideration the licensee's records, the consumer's consumption record and history, available technical evidence and other relevant circumstances to rectify such undercharged or overcharged situation:

Provided that the period for any retrospective adjustments shall not exceed three months from the date the consumer has been informed about being undercharged or overcharged.

[107] In its broad grounds, the Court of Appeal in *Tenaga Nasional Berhad v. Wong Kwi Fong* No. W-02-2901-2010 (Unreported) had taken the position that reg. 11(2) "is not applicable to a case of meter tampering, ie, an offence under s. 37(3) of the Electricity Supply Act (ESA) and the claim for loss of revenue arising there from; ...". Since the court has found that there is evidence of tampering in the first inspection, the defendant's reliance on reg. 11(2) is of no merit as reg. 11(2) does not apply.

[108] Nevertheless, the plaintiff's claim is unsustainable for the reasons already explained; especially given that the right to recover for loss of revenue is a statutory claim. That, however, is not the plea.

[109] Although the meter was faulty at the material time of the second inspection that does not mean that the plaintiff is not entitled to make its claim. However, such a claim is properly made under the LSR 1990. Under reg. 11(2), the plaintiff may claim for retrospective adjustments not beyond three months from the receipt of notice dated 11 July 2011 by the defendant. This means the plaintiff may claim for the period from 11 July 2011 till 11 April 2011.

[110] However, the plaintiff's claim for this second inspection is not sustainable because the claim in court is for the period from 26 January 2011 to 16 March 2011; and not for the period from 11 April 2011 to 11 July 2011.

Whether The Defendant May Claim From The Plaintiff For Damages Amounting To RM5,382,139.56 And USD85,000 Due To The Disconnection Of Electricity Supply On 21 April 2011

[111] This final issue relates to the defendant's counterclaim for losses which it claimed that it had sustained as a result of the plaintiff's disconnection of electricity supply on 21 April 2011.

[112] It must be pointed out that the counterclaim is not for the parameter fence that was allegedly damaged during the first inspection. For this, I accept that it was already in the state complained of prior to the plaintiff's

A entry. Were it otherwise, the court would not have heard evidence from PW1 of the efforts of the team looking for ways to enter; and that the team (auxiliary police entering through a broken parameter fence).

[113] This is how the electricity came to be disconnected. According to PW3's testimony, there were two cases of tampering of the defendant's
B meter; one on 26 January 2011 while the other was on 16 March 2011. PW3 relied on the actions and records produced by PW1 and PW2.

[114] The plaintiff's records show that PW1 and his team had found the presence of a clamp on the defendant's meter installation. The clamp caused
C or prevented the meter from recording the actual consumption of electricity. The plaintiff took the view that there was reasonable proof of the commission of an offence of tampering under sub-ss. 37(1), (3) and/or (14) of the ESA 1990. A police report to that effect was made.

[115] Similarly, arising from the second inspection, after PW2 found a
D mark on the TNBM sticker which suggested that the meter was tampered with; that the power reading on the red phase of the main meter is 0 amp whilst the yellow and blue phases of the readings are in reversed; that the power readings for all three phases of the check meter is 0 amp while the voltage reading for the yellow phase is 0 amp; and that the neon fuse of the
E yellow phase had blown; all pointing to evidence of tampering of the meter, a police report to the effect that the plaintiff had reasonable proof of a commission of an offence of tampering under sub-ss. 37(1), (3) and/or (14) of the ESA 1990 was made.

[116] The records also show that on 4 April 2011, the plaintiff had written
F to the defendant informing of the tampering and that an adjustment calculation for the unbilled electricity usage by the defendant will be prepared by the plaintiff – see p. 44 of Bundle 1. After PW5 had recalculated the charges due, the plaintiff notified the defendant to pay the outstanding amount of RM1,579,981.35 *vide* letter dated 13 April 2011 – see p. 45 of
G Bundle 1. The sum was not paid. The plaintiff had also issued a notice of demand for the sum of RM52,582.94 arising from the second inspection. The defendant has also failed to satisfy this sum.

[117] According to PW3, with these two cases of tampering and the defendant not responding or settling the plaintiff's claims, the plaintiff's
H management took the matter seriously. In view of "kes pengusikan tenaga elektrik berulang", the plaintiff decided to exercise its rights under sub-s. 38(1) of ESA 1990 and cls. 10 and 21 of the supply contract to disconnect the electricity supply.

[118] Notice of such intention was given to the defendant on 20 April
I 2011. On 21 April 2011, PW3 who was accompanied by another officer, disconnected the electricity supply at the defendant's premises. PW3 testified that electricity supply was re-connected seven days later.

[119] Apart from its allegations that the disconnection was unlawful, the defendant's submission is that the electricity supply was disconnected prematurely as a notice of 14 days is required.

[120] According to DW4, he had gone to the plaintiff's office to appeal to the plaintiff to re-connect the electricity supply but he was unsuccessful. The defendant claimed that the electricity supply was only re-connected 12 days later. Because of the nature of its business, the defendant needed a supply of electricity. Upon the disconnection of supply by the plaintiff, the defendant rented a generator set. However, the set that it rented broke down. The defendant then tried to rent cold storage facilities but according to DW4, all were fully occupied. The prawns started to rot and the defendant attempted to sell them off as fish food.

[121] The defendant is counterclaiming for losses amounting to RM5,371,660.20 allegedly suffered. These losses comprise the value of the prawns which were spoilt and the costs incurred from paying salaries to employees during the period the factory was closed. An additional amount of US 85,000 is also claimed. This sum is the value of the prawns demanded by a customer, Dong Ju Trading Co. The prawns could not be sold as required and the defendant makes this claim as that contract was considered breached. The defendant issued a Credit Note No CN00017 in the amount of USD85,000 in favour of Dong Ju and this is produced as evidence of the loss – see p. 323 of Bundle A1. Out of the total sum of RM4,884,445.20 worth of spoilt prawns, the defendant claimed that it could only manage to sell RM10,749.36 worth as fish feed.

[122] In response, learned counsel for the plaintiff submitted that the disconnection of electricity only required a 24-hours notification as provided by sub-s. 38(1) of the ESA 1990 and sub-reg. 6A(1) of the LSR 1990. As for the mitigation efforts of the defendant, the plaintiff claimed that the defendant could have done more since sufficient notice had been given. The plaintiff further submitted that the losses actually arose from the defendant's own acts of tampering in which case, it is not entitled to compensation.

[123] In two decisions of the Court of Appeal are clear views of the court that sub-s. 38(1) empowers the plaintiff to disconnect the supply of electricity to its customers in given circumstances. First is the decision of *Claybricks & Tiles Sdn Bhd lwn. Tenaga Nasional Bhd* [2006] 4 CLJ 892; [2007] 1 MLJ 217 where the Court of Appeal said:

> Section 38(1) of the Act does not require the offence to be proven before the Court prior to an action is taken to cut off the electricity supply could be done by TNB (see para 7); *Tan Yeong Kim v. Tenaga Nasional Berhad* [2000] 8 CLJ 629; [2000] MLJU 447 followed and *Dai-Ichi Electronics (M) Sdn Bhd v. Tenaga Nasional Bhd* [1996] 4 MLJ 506 not followed. If the proving of guilt process by the court is required, it will take a long time

A before the power under s. 38(1) of the Act could be exercised. Section 38(1) of the Act is specifically provided to safeguard the interest of the respondent and to enable the respondent to act expediently to prevent abuse such as stealing the electricity supplied by the respondent. If the legislative body intended that the offence is to be proven before the court is required before the power under s. 38(1) of the Act could be exercised, B it has to make a clear provision. However, there was no such provision made. The interpretation submitted by the appellant could not be accepted because if the court did so by inserting its own words to be used in the Act, it would be against all the principles of statutory interpretation.

[124] This view was repeated in *WRP Asia Pacific Sdn Bhd v. Tenaga* C *Nasional Bhd & Another Appeal* [2011] 4 CLJ 839 where the court said:

Section 38(1) ESA provides specifically for the preservation of TNB's interests and empowers TNB to act expeditiously, thereby preventing misuses such as theft of electricity supplied by TNB. Legislature did not intend that an offence be proven in Court before s. 38(1) ESA can be D invoked as any review would defeat swift enforcement under the ESA, where the supply of electricity needs to be severed, immediately to avoid further illegal usage by the perpetrator.

[125] Although the Court of Appeal in both cases was discussing about the issue of whether a conviction was required before the plaintiff could E disconnect electricity, the observations of the court on the plaintiff's right to disconnect is highly pertinent to the present issue. In my opinion, this right to disconnect is part of the preventive and pre-emptive measures that the legislation has given to the plaintiff to prevent "misuses such as theft of electricity supplied by TNB ... so that the plaintiff can act swiftly ... to avoid F further illegal usage by the perpetrator".

[126] Having examined PW3's evidence, I am satisfied that at the material time, he was of the opinion that an offences has been committed. In fact, PW3 testified that police reports to that effect had been lodged by PW1 and PW2. The offences mentioned in the police reports were those under G sub-ss. 37(1), (3) or (14) of the ESA 1990. The plaintiff's decision to disconnect the supply of electricity was not made arbitrarily or without basis. The opinion of the plaintiff as reflected in PW3's evidence is on good basis or grounds and is reasonable on the facts as set out earlier. There were indeed the two inspections and what the plaintiff deduced as evidence of tampering. H It had issued the necessary notices and had asked for payment, which the defendant had not responded.

[127] Under such circumstances, PW3 and thereby the plaintiff was therefore justified in exercising the right to disconnect the supply of electricity to the defendant's premises under sub-s. 38(1). I agree with the I plaintiff that this right under sub-s. 38(1) was enacted to give the plaintiff effective powers to expeditiously prevent any further commission of offence

and/or misuse. Indirectly, it preserves the plaintiff's interests. Therefore, the disconnection was not erroneous and the defendant is not entitled to its claim.

[128] The defendant is also not entitled to its counterclaim as the second entry or inspection was lawful although ultimately, this court has since found that there is no tampering but, a case of a faulty meter. The second inspection was a routine inspection and the plaintiff "stumbled upon" and found what it perceived to be evidence of tampering. At that material time, the plaintiff or PW3, having been advised by PW4, and having considered the reports filed by PW1 and PW2 and what the respective teams had found at the defendant's premises, formed the opinion that such evidence proved that an offence under sub-s. 38(1), (3) or (14) had been committed.

[129] PW3 did not have the benefit of weighing DW3's evidence as the court now has in these proceedings. That, however, does not change the fact that sub-s. 38(1) requires the plaintiff's employee, PW3 in this case, to form an opinion on whether the evidence found in the defendant's premises prove that an offence under sub-s. 37(1), (3) or (14) has been committed. Once he has formed such an opinion, sub-s. 38(1) empowers him to disconnect the supply of electricity to the defendant's premises. Since PW3 did have that opinion, the decision to disconnect was justified and in accordance with sub-s. 38(1). Consequently, the defendant's counterclaim must fail.

[130] I must add that I do not find merit in the defendant's argument that the plaintiff could only disconnect the electricity upon expiry of 14 days since the plaintiff had given the defendant 14 days to pay. Until and unless that period had lapsed, the right does not arise.

[131] With respect, the court disagrees. The right to disconnect under sub-s. 38(1) is not upon unsettled bills but for the reasons or basis already discussed above. Regulation 6A of the LSR 1990 furthermore allows for the plaintiff to give not less than 24 hours' notice before disconnecting any supply from any premises pursuant to sub-s. 38(1).

[132] The plaintiff has duly complied with the requirements of sub-s. 38(1) and reg. 6A. Accordingly, the disconnection is proper and lawful.

Conclusion

[133] For all the reasons set out above, both the plaintiff's claim and the defendant's counterclaim are dismissed. Both parties are further ordered to bear their own costs.